STRAITS SETTLEMENTS REPORTS.

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[APPELLATE CRIMINAL JURISDICTION]
McELWAINE, C.J., WHITLEY & MILLS, JJ.
December 17, 1936.

REX
v.
SEOW PNG.

[SINGAPORE CASE No. 5 of 1936].

Criminal Law—armed robbery without hurt —punishment—Penal Code, S. 397.

Where an accused person is convicted under Section 397 of the Penal Code of armed robbery without causing hurt the Court has no power to award whipping with a cat o'nine tails in addition to rigorous imprisonment.

CASE stated by Clark, J. for consideration by the Court of Criminal Appeal under Section 319 of the Criminal Procedure Code.

Goho for the Accused.

Walters D.P.P. for the Crown.

The judgment of the Court of Criminal Appeal consisting of McElwaine, C.J., Whitley & Mills, JJ., was delivered by—

MCELWAINE, C.J.—This is a case stated by Clark, J. under s. 319 of the Criminal Procedure Code.

Seow Png was charged at the Singapore November Assizes, 1936 "That you, Seow Png on or about the 3rd day of September 1936, at Singapore committed gang robbery of two chandu pipes, $22 in cash and other chattels in the possession of Tan Sin and his wife Sen Ho and at the time of committing the said offence you used a deadly weapon, to wit, a knife and thereby committed an offence punishable under section 397 of the Penal Code."

The case states that the evidence disclosed that accused was armed with a knife with which he threatened people while he and others robbed them.

No wound was inflicted with this knife.

A woman was, however, seized by the neck and partly choked to prevent her calling out.

The jury was not satisfied that more than four persons took part in the robbery so the accused was convicted not of gang robbery but of armed robbery under s. 397 of the Penal Code. He was sentenced to seven years R.I. and twelve strokes of the cat o' nine tails.

The judge stated this case because after sentence a doubt arose in his mind as to whether the sentence of whipping was lawful.

The punishment for ordinary robbery is rigorous imprisonment for a term not exceeding 10 years. Penal Code section 392.

But if the robbery takes place on the highway between sunset and sunrise the imprisonment may be 14 years and the culprit may also be whipped with the cat o' nine tails or rattan.

If in committing robbery hurt is caused whipping with cat or rattan may also be awarded. Penal Code section 394. In the present case hurt within the meaning of section 319 was caused to the woman who was partly choked, but this was not charged, nor, from the case stated can we infer that the choking was done by the accused, nor are we in a position to say that it was done with a common intent so as to make Seow Png responsible under sections 34 or 35. If hurt is alleged as an ingredient of an offence under s. 397 it should be expressly alleged in the charge, *R.* v. *Bright*, (1916) 2 K. B. 441. The case therefore is, is armed robbery without hurt whether simple or grievous punishable with whipping? We think that it is not.

The section appears to us to be one which relates back to other sections. It speaks of "*the* imprisonment." To ascertain the maximum imprisonment that can be awarded one must refer to sections 392, 394, 395 or 396.

The concluding words of the section "and any whipping shall be with a cat o' nine tails" were added by Ordinance No. 25 of 1919.

If whipping was intended for mere armed robbery one would expect these added words to be "and shall also be liable to whipping with a cat o' nine tails" as in the concluding words of s. 396 which was amended by the same Ordinance No. 25 of 1919.

"*Any* whipping," like 'the imprisonment' appears to us to relate back to earlier sections. It merely described the instrument with which the whipping is to be done if it is awarded: it does not in itself authorize whipping. The sections which expressly state that the prisoner shall be liable to whipping are section 392 if the robbery is on the highway between sunset and sunrise; section 394 if hurt is caused.

We are therefore of opinion that on the true construction of this section whipping cannot be awarded unless hurt has been done, or unless the robbery took place on the highway between sunset and sunrise.

We cannot say that this result was not what the Legislature intended, but it may be worthy of the consideration of the Legislature whether a robber who subdues his victim by the threat of instant death or hurt at the point of a deadly weapon is not as deserving of whipping as the robber who effects his purpose by a slight blow.

The sentence of whipping is set aside. The sentence of seven years rigorous imprisonment of course stands.

Sentence partly set aside.

[ORIGINAL CIVIL JURISDICTION]
McELWAINE, C. J.
January 28, 1937.

RE ENA MOHAMED TAMBY DECEASED.

[SINGAPORE ORIGINATING SUMMONS No. 178 of 1936]

Mohamedan marriage agreement.

A Mohamedan intending husband and wife can enter into an agreement in contemplation of marriage. By such an agreement the wife can agree to her exclusion from her share in her husband's estate on his decease, *semble*, either wholly or in part. Similarly by such agreement the husband can bar himself of his freedom to dispose of his whole estate by will.